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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

DAVID PROSSER RANDELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

David Prosser Randell, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 9, 1969.

OPINIONS BELOW

The opinion of the Court below on the original hearing (Appendix A, pp. 1a-6a) is not officially reported. The opinion of the court below on the rehearing then rendered (Appendix C, pp. 8a-9a) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals following the original hearing (Appendix B, p. 7a) was entered December 9, 1969. The opinion below denying the petition for rehearing was filed on February 26, 1970 (Appendix C, pp. 8a-9a). On March 23, 1970, Mr. Justice Black extended the time for filing a peition for a writ of certiorari to and including April 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether an impermissible amendment to a mail fraud indictment was effected prior to trial when the trial judge struck pertinent portions of each of 22 counts, thus depriving the court of jurisdiction to proceed with the trial.

2. Whether the span of four years and ten months between indictment and trial, in the aggregate, amounted to unnecessary and oppressive delay infringing petitioner's Sixth Amendment right to a speedy trial, on showing that delay resulted primarily from the prosecution's and the trial court's action to defeat venue at petitioner's home district, together with inexcusable dormancy of the case on the court dockets in apparent disregard of Rule 50 F.R. Crim. P. giving priority to criminal cases.

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES INVOLVED

Title 18, U.S.C., § 1341, under which the indictment was returned, provides:

> " Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell. . . places in any post office. . . for mail matter. . . to be sent or delivered by the Post Office Department

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. . . or knowingly causes to be delivered by mail according to direction thereon. . . any such thing" [is guilty of an offense].

FIFTH AMENDMENT TO THE CONSTITUTION: No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . .

SIXTH AMENDMENT TO THE CONSTITUTION: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .

RULE 7, FEDERAL RULES OF CRIMINAL PROCEDURE, in pertinent part reads as follows:

"Rule 7. The Indictment and the Information.

* * *

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information."

RULE 50, FEDERAL RULES OF CRIMINAL PROCEDURE, reads as follows:

"Rule 50. *Calendars.*
The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable."

STATEMENT[1]

In view of the limited number of issues presented by this petition, only those facts now relevant are set forth here.

On March 14, 1963, petitioner and two others[2] were indicted on twenty-two counts under 18 U.S.C. § 1341 for devising a scheme to defraud by use of the mails. The indictment alleged, among other things, that the offense was committed by petitioner's use of the mails sending false and misleading advertisements to prospective customers inducing them to purchase lots in petitioner's subdivision.

The trial did not commence until January 29, 1968, four years and ten months after the indictment was returned. Prior to trial, on December 11, 1967, the trial court passed an order striking three separate portions of the indictment from each of the 22 counts. Immediately before trial, petitioner waived a jury, was tried by the court, and conviction on all counts followed.

A. The basic facts on the issue of the impermissible amendment to the indictment.

The indictment contained 22 counts. Count I set forth the alleged scheme to defraud in 10 numbered paragraphs and subparagraphs. Counts II through XXII, by incorporation, reiterated all of the allegations in paragraphs 1 through 10 of Count I, and differed with one another only with respect to the name and address of the prospective land purchaser named in each of the counts.

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[1] "R" refers to the original record and "R. Dkt. Entries" refers to docket entries contained in the original record.

[2] The two co-defendants, Dory Auerbach and Irving Gottlieb, jointly filed a separate petition for a writ of certiorari No. 1353, October Term, 1969.

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The allegations in Count I (reiterated in all the other counts) set out a single scheme to defraud persons by inducing them to purchase lots in a subdivision called Lake Mead Rancheros, located in Mohave County, Arizona. The core of the indictment and bill of particulars (Appendix D, pp. 10a-24a) charged that petitioner devised a scheme to defraud prospective land purchasers by falsely representing the existence of public utilities on the property, *i.e.* power, phone and water pipe lines, when, in fact, none existed and that the petitioner did not even own the land (Appendix D, pp. 16a-18a; 23a). Typical of the alleged misrepresentations were: ' "That the Lake Mead Rancheros subdivisions were "Laid out, waiting for people," "livable now," "fully developed and improved"; "We have acquired complete utility services . . . ."; "Power lines are already on this newly acquired land . . . . Telephone lines traverse this property . . . ." (Appendix D, pp. 14a-15a; 16a-18a).

But in paragraph 7 of Count I, it was clear that the indictment alleged that as part of the scheme to defraud, the petitioner had purchased a large tract of land adjacent to the existing subdivision which did in fact contain existing power, phone and water lines and that the land was being subdivided for sale to prospective land purchasers. (Appendix D, pp. 15a-16a). However, more than a month prior to trial, following denial of petitioner's mo tion to dismiss the indictment, the trial court, *sua sponte*, struck out all of paragraph 7 of Count I. (R. 2851, 2907-2908, 2933). Paragraph 7 provided as follows: (Appendix D, pp. 15a-16a).

> "It was a further part of said scheme and artifice to defraud that the defendants would and did, about September, 1962, after approximately three thousand persons had purchased lots in the said original seventeen Lake Mead Rancheros subdivision units, commence negotiations for the purchase by Lake Mead Rancheros, Inc., of land at the junction of U.S. Highway 66 and Hackberry Road in Mohave County, approximately six miles distant from the

nearest of their then existing seventeen subdivision units, which land was adjacent to U.S. Highway 66, *along or near which highway there were existing power and telephone lines and a water pipe line carrying water to the City of Kingman, Arizona,* and would and did cause Lake Mead Rancheros, Inc., to enter into an agreement with the Arizona Land Title & Trust Company of Tucson, Arizona, on or about January 2, 1963, for the purchase of such land, that land being all of Section 31 lying north of U.S. Highway 66, in Township 24 North, Range 14 West, Gila & Salt River Base and Meridian, in Mohave County, Arizona, which said Section 31 is crossed by U.S. Highway 66, said purchase agreement providing for the first release of land thereunder to the vendee upon payment of the sum of $51,000.00, which payment is due under the terms of said agreement on or before December 20, 1963, and would *and did,* on or about January 15, 1963, *cause that portion of the said Section 31 situated north of U.S. Highway 66 to be subdivided as Lake Mead Rancheros subdivision unit No. 20.*" (Emphasis added.)

Other portions of the indictment stricken by the Court were the following:

Paragraph 6c.: (Appendix D, p. 15a)

"That Lake Mead Rancheros are a 'jackpot investment', 'among the finest investments anywhere', and 'directly located in the path of Arizona progress'."

Paragraph 8a.: (Appendix D, p. 16a)

"Build in a new community coming to life! A new community is about to come to life—and you can have a part of its future! Lake Mead Rancheros has always been one of the best long-range investments you could make . . . but now your investment dollar gets much more!"

B. Basic facts on the speedy trial issue.

A 22-count multi-venue mail fraud indictment was returned in the District of Arizona on March 14, 1963. Venue was also proper in the Southern District of Florida where the petitioner resided. The trial commenced on January 28, 1968, four years and ten months after the indictment. The chronology of events follow:

(1) *46 days from March 14 to April 29, 1963.* 30 days delay (March 14 to April 15 delay on arraignment) was requested by the defendants. The additional 14 days delay was at the government's request (R. Dkt. entries).

(2) *110 days from April 29 to August 16, 1963.* The case lay dormant (R. Dkt. entries).

(3) *73 days from August 16 to October 28, 1963.* August 16, 1963 petitioner filed a motion to transfer the case to the Southern District of Florida. The grounds were (1) financial hardship to conduct a protracted trial 2,200 miles from home; (2) availability in Florida of character witnesses whose presence in Arizona would be ineffective; and (3) availability of records of land transactions, all of which were in Florida. The government's response and petitioner's reply were filed. On October 28, 1963 the court took the motion under advisement. Petitioner filed motions for discovery and a bill of particulars (R. Dkt. entries; 2136, 2638-2653; 2654-2658).

(4) *31 days from October 29 to November 29, 1963.* On November 18, 1963 an order was entered denying the petitioner's motion for a change of venue. The case otherwise remained dormant (R. Dkt. entries). (To this point 214 days had elapsed since the indictment on March 14, 1963.)

(5) *67 days from November 29, 1963 to February 4, 1964.* On November 29, 1963 petitioner filed a motion for rehearing on the denial of his motion for

change of venue. On December 31, 1963, a month later, the government filed its opposition to the petitioner's motion for rehearing—the government also filed oppositions to petitioner's motions for discovery and a bill of particulars (filed two months previously by petitioner on October 28, 1963). On February 4, 1964 an order was entered holding in abeyance decision on the motions. (R. Dkt. entries; 2669-2760; 1684-2697).

(6) *173 days from February 4 to July 27, 1964.* The case lay dormant from February 4 to July 27, 1964, except on May 7, 1964 an order was noted on the docket setting the case for trial on October 1, 1964. It is significant to this issue that the trial was never called on that day nor was the entry ever removed or modified. On June 24, 1964 an order was noted on the docket assigning the case to another judge. The pending motions were heard on July 27, 1964. The motions for change of venue to the Southern District of Florida and for a bill of particulars were granted. The motion for discovery was denied (R. Dkt. entries; 2700, 2707).

(7) *38 days from July 27 to September 4, 1964.* Nothing transpired except the case file was received by the Florida court on September 4, 1964 (R. Dkt. entries).

(8) *28 days from September 4 to October 2, 1964.* This period of delay was at the government's request to file a bill of particulars. It was filed on October 2, 1964 (R. Dkt. entries; 2709, 2710-2714).

(9) *152 days from October 2, 1964 to March 4, 1965.* Nothing transpired (R. Dkt. entries). (The trial setting of October 1, 1964 (supra) was ignored.) (At this point 718 days had passed since the indictment on March 14, 1963.)

(10) *309 days from March 4, 1965 to January 7, 1966.* This is the controversial period. On March 4, 1965, without notice or a hearing of any kind, Chief Judge

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Charles Fulton of the Southern District of Florida, *sua sponte*, filed an order retransferring the case to the Arizona court. The petitioner filed a motion for an immediate trial; it was noted on the docket, but the moving papers were returned by the clerk to defense counsel. Petitioner filed a timely notice of appeal from Judge Fulton's order. The appeal was dismissed by the Fifth Circuit Court of Appeals as interlocutory. A vigorous dissent was filed by Chief Judge Brown, *Auerbach, et al. v. United States*, 374 F.2d 742, questioning the authority of District Judge Fulton to review and nullify the order of the Arizona district court transferring the case to Florida. A motion for a rehearing *en banc* was denied with a further dissent by Chief Judge Brown on July 30, 1965. A petition for a writ of certiorari was filed in this Court, No. 625, October Term, 1965, to test the power of one district judge to review the order of another district judge in another circuit transferring a case under Rule 21(b), F.R.Cr.P. The petition was denied on December 13, 1965, but Mr. Justice Douglas was of the opinion that certiorari should have been granted. 382 U.S. 958. Petitioner thereafter filed a petition for a writ of mandamus to the Circuit Court of Appeals urging that Rule 21(c), F.R.Cr.P.[3] mandatorily required the transferee district court to proceed with the transferred case under Rule 21(b). The petition for the writ was denied on January 5, 1966. The case record was received again in the Florida district court on January 7, 1966 (R. Dkt. entries; 2719, 2762).

(11) *98 days from January 7 to April 15, 1966.* The case file remained in the Florida court from January 7 to April 15 when it was finally transmitted to Arizona (R. 2769).

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[3]Rule 21(c): "When a transfer is ordered the Clerk *shall* transmit to the Clerk of the Court to which the proceeding is transferred all papers in the proceeding . . . and the prosecution *shall* continue in that district." (Emphasis added.)

(12) *260 days from April 15 to December 13, 1966.* The case remained dormant in the Arizona court during this entire period. On October 6, 1966 petitioner filed a motion to return the case to Florida. The motion was granted and the case file was returned to the Florida court on December 13, 1966 (R. Dkt. entries; 2770, 2773).

(13) *29 days from December 13, 1966 to January 11, 1967.* Nothing transpired during this period, but on January 11, 1967 the case was transferred from the assigned judge to another judge (R. 2774).

(14) *383 days from January 11, 1967 to January 29, 1968.* Nothing transpired, except on July 28, 1967, counsel received a notice of a pre-trial setting for December 28, 1967 and trial for January 28, 1968 (R. Dkt. entries; 2775-2777).

The trial commenced on January 28, 1968, four years and ten months after indictment.

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REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with pertinent principles established by this Court since *Ex parte Bain*, 121 U.S. 1 (1886), reiterated in *Stirone v. United States*, 361 U.S. 212 (1960), and *Russell v. United States*, 369 U.S. 749 (1962), and decisions of the Second, Third, and Ninth Circuits[4] inveighing against a court amending an indictment before trial lest it lose jurisdiction to try the offense charged.

2. The decision below also directly conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *Marshall v. United States*, 337 F.2d 119 (1964), respecting Sixth Amendment rights to a speedy trial, and, conflicts with the rationale of the Court of Appeals for the Eighth Circuit in *Hodges v. United States*, 408 F.2d 543 (1969), on the important and hitherto unresolved issues growing out of the criminal administration of court calendars under Federal Criminal Rule 50 to avoid unnecessary and oppressive trial delays.

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[4]*Second Circuit: United States v. Consolidated Laundries*, 291 F.2d 563, 571 (1961); *Dodge v. United States*, 258 F. 300, 305 (1919). In accord: *DeLuca v. United States*, 299 F. 741, 745 (1924).

Third Circuit: United States v. Williams, 412 F.2d 625, 627-628 (1969).

Ninth Circuit: Carney v. United States, 163 F.2d 784, 788-790 (1947); *Stewart v. United States*, 12 F.2d 524, 525 (1926). In accord: *Heisler v. United States*, 394 F.2d 692, 695-696 (1968).

Other cases in accord: *Gaither v. United States*, 413 F.2d 1061, 1066 (C.A.D.C., 1969); *Thomas v. United States*, 398 F.2d 531, 536-540 (C.A. 5, 1967); *Natzger v. United States*, 200 F. 494, 497 (C.A. 8, 1912); *United States v. Howard*, 132 F. 325, 344 (W.D. Tenn., 1904).

1. The decision below directly conflicts with this Court's principles announced in *Ex parte Bain* and the *Stirone* and *Russell* opinions that an indictment may not be amended except by resubmission to the grand jury, unless the change is a matter of form.

The Court of Appeals in this case held that the trial court did not commit reversible error striking the several portions of the indictment (*supra*, pp. 4-6) "because of the liberalizing effect Rule 7(c) and (d) has had on the principles enunciated in *Ex parte Bain*, 1886, 121 U.S. 1 . . . ." (App. C, p. 9a) The Fifth Circuit's authorities and texts cited in support (App. C, p. 9a) are inapposite.

The issue is thus raised whether Rule 7(c) and (d), F.R. Crim.P. authorizes courts and prosecutors to strike portions of indictments without running the risk of dismissal for want of jurisdiction.

Rule 7(c) in pertinent part provides: "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The remainder of 7(c) refers to formal parts of the indictment. No mention is made of the right of a court or prosecutor to change the wording.

Rule 7(d) provides: "The Court on motion of the defendant may strike surplusage from the indictment or information." There is no provision for the court or the prosecutor even to strike surplusage—it must be on motion of the defendant. None of the matters dismissed by the court could be considered surplusage.

The stricken allegations of paragraph 7 of Count I were not unintelligible as to the means of carrying out the scheme to defraud. They rather aided the defense in the light of contrary allegations in other portions of the indictment—striking paragraph 7 tended to broaden the base of proof benefiting the prosecution by narrowing petitioner's defense.

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By upholding the trial court, the Circuit Court abandoned unbroken precedent ranging from *Ex parte Bain* (1886), 121 U.S. 1, to *Russell* (1962), 369 U.S. 749, which supports the underlying principle reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grant jury, unless the change is merely a matter of form. This Court said that it is beyond question that indictments could not be amended. To do so deprives the Court of power to proceed to trial. *Ex parte Bain, supra.*

Other Circuit Court decisions have uniformly applied the rule in *Ex parte Bain* that any substantial amendment to the body of an indictment renders the conviction void. The Second Circuit[5] considered that although the insertion of a comma might superficially appear to be only a typographical error, the change actually substituted one corporate entity for another. Dismissing the indictment as to a particular defendant, the Second Circuit cited the rule laid down in *Ex parte Bain* as controlling.

In *United States v. Williams,*[6] *supra,* the court held an indictment expired charging violation of the National Fire Arms Act when the trial judge permitted deletion of the words "which had not been registered with the Secretary of the Treasury or his delegate as required by section 5841, Title 26, USC . . ." and insertion, in lieu thereof, the words "for which no tax had been paid as required by section 5811."

The indictment in *Dodge v. United States,* 258 Fed. 300 (C.A. 2, 1919), charged violations of the Espionage Act. The government moved to strike the word "mutiny" as surplusage. The granting of the motion with consent of defense counsel was ". . . error of the most serious kind . . ." and fatal to the verdict on the count, citing *Ex*

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[5] *United States v. Consolidated Laundries,* 291 F.2d 563, 571 (C.A. 2, 1961).

[6] 412 F.2d 625, 627-628 (C.A. 3, 1969).

parte Bain. Counts were voided by striking the words "and feloniously and" in *Stewart v. United States,* 12 F.2d 524-525 (C.A. 9, 1926), also citing *Ex parte Bain.* The letter "K" was changed to "A" in the indictment by the court with the counsels' consent making the charge read that the accused had counterfeited "A-14h" stamps instead of "K-14h" stamps. Adhering to this Court's rule in *Ex parte Bain,* the Ninth Circuit[7] voided those counts asserting that "no authority exists to amend any part of the body of an indictment . . . to do so ousts the court of its power to proceed," citing *Ex parte Bain.*

It is not easy, if it is possible at all, to reconcile the decision below with the Ninth Circuit's rationale in *Heisler v. United States* (1968), 394 F.2d 692, stating at p. 695:

> "Ever since the decision in *Ex parte Bain* (1886), 121 U.S. 1, it has been the rule that any substantial amendment to the body of an indictment renders the conviction void. See also *Stirone v. United States* (1960), 361 U.S. 212, 215-217 and *Russell v. United States* (1962), 369 U.S. 749, 770."
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> * * *
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> "The draftsmen of the Federal Rules of Criminal Procedure greatly simplified the form of an indictment (Rule 7(c)). . . . They also provided for striking out surplusage on motion of the defendant (Rule 7(d)), but they made no provision for amendment because the ruling in *Bain* rests upon constitutional requirements. (Notes of Advisory Committee, 18 U.S.C., Rule 7(d))."

Can it be said that the omission of Section 7 of Count I from the indictment did not deprive the petitioner of one of of the significant protections which the guaranty of a grand jury indictment was intended to confer? See, *Russell v. United States,* 396 U.S. 749, 763.

The Circuit Court suggests that Criminal Rule 7(c) and (d) had somehow dissolved the federal rule in *Ex parte Bain*

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[7] *Carney v. United States,* 173 F.2d 784, 788 (C.A. 9, 1947).

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voiding amended indictments which had not first been resubmitted to the grand jury. Had Congress intended this result, it would have said so at least in debate if not in the Rule itself. Neither the Congress nor the Advisory Committee on the Rules hinted that Rule 7 was expected to liberalize the Fifth Amendment safeguard against accusation save by indictment of a grand jury.

This indictment and bill of particulars[8] charged in paragraphs 6 and 8 (Count I) that petitioner falsely advertised the land as "livable now" with electricity, phones and water lines, and, alternatively, in paragraph 7 (stricken by the Court), charged as a part of the scheme, that petitioner purchased a large subdivision for resale which did in fact have electricity, phones and water lines.[9] Obviously, the grand jury could not have intended to hide the fact that petitioner did purchase and offer for sale lots actually equipped with the very utilities the indictment charged were not present. What did the grand jury intend? Was the offense to be one where petitioner had no intention of selling land as advertised—as selected by the trial judge? Or was the offense one where the lots for sale were not misrepresented, at least with respect to the existence of utilities as advertised? Did the district court think it would be a simpler case if the ambiguity was summarily severed from the indictment?

Since no one can tell whether the grand jury would have indicted petitioner at all unless paragraph 7's description of the existence of the utilities on a large part of the subdivision was included in the charge, the district court lacked the power to make the choice for the grand jury.

The vital function of the grand jury ought not to be whittled down to extricate prosecutors from the consequences of slovenly draftsmanship. Neither the judge nor the prosecutor is the grand jury. Neither can determine

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[8]Appendix D, pp. 14a-15a, 16a-18a.

[9]Appendix D, pp. 15a-16a.

what the grand jury might have done. Each is bound by what the grand jury had done. *Ex parte Bain, supra,* 121 U.S. 1.

The principle is of undeniable vitality and force and should receive the earnest consideration of this Court.

2. The decision below is in direct conflict with *Marshall v. United States*, holding in similar circumstances that, in the aggregate, the long delay was oppressive and vexatious; and is in conflict with the rationale in *Hodges v. United States* and the commands of Criminal Rule 50, giving calendar preference to criminal cases.

The District of Columbia Circuit said: "If we were 'talking English, not law,' it would not be suggested that a man who was tried three years and eight months after indictment had a 'speedy trial' . . . We think he did not." *Marshall v. United States*, 337 F.2d 119, 121 (C.A.D.C., 1964). Following the approach in *Marshall*, we say the petitioner did not have a "speedy trial" after four years and ten months.

Marshall was tried 43 months after an indictment for rape. In the interim, he had gone through a mistrial and subsequently pleaded guilty interrupting his second trial. After serving six months, he moved to vacate his guilty plea. The motion lay dormant for 16 months during which he was incarcerated. The plea was vacated and his third trial was set for July 16, 1962. His third and last trial resulted in conviction on July 8, 1963, one year later. The *Marshall* decision outlined its chronology as we did (*supra,* pp. 7-10) in this case. In setting aside the conviction on Sixth Amendment grounds, the District of Columbia Circuit in *Marshall* said: "Though the delay was not purposeful in any meaningful sense, much of it was arbitrary, and in the aggregate was oppressive and vexatious." (337 F.2d at p. 119).

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If the rationale in *Marshall* is correct, then petitioner justly complains that the Circuit Court below penalized him for pursuing his due process right to be tried in his home district with reasonable speed in accordance with the Sixth Amendment. He was arbitrarily uprooted from Florida by District Judge Fulton's *sua sponte* order sending him to Arizona for trial after the Arizona court had transferred venue to Florida several months prior under Rule 21(b). Judge Fulton's retransfer order was in open defiance of the mandatory provisions of Rule 21(c) which provides that the transferred case (from Arizona) *shall* proceed in the transferee district (Florida).

Petitioner ran the gauntlet of appeals for 309 days of the 1,760 days between indictment and trial. Rejecting petitioner's arguments that he was denied a speedy trial, the court below observed that–

> "The record, however, affirmatively indicates that appellants repeatedly sought the aid of both the Florida and Arizona District Courts, this Court, and the United States Supreme Court in asserting both their constitutional and statutory rights. Having sought the aid of judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon." (App. A, pp. 5a-6a)

Assuming, *arguendo*, no one is chargeable with the 309 day odessey through the judicial hierarchy–what of the remaining 1,451 days? Although petitioner unsuccessfully moved to dismiss the indictment before trial for want of a speedy trial, he nevertheless demonstrated by a series of compilations from the court files that either the Arizona or the Florida court could have easily disposed of the case without affecting their calendars (R. 2859-2895, D.Ex. on Motion to Dismiss). The dockets of both courts appeared current respecting all other criminal cases. No explanation for the neglect was offered from any quarter.

As far as it appears, the case could have been called in

Arizona during the period after indictment in March 1943 prior to its transfer to Florida ordered on July 27, 1964. Or, it could have been called in Florida any time during the dormancy of 180 days prior to its retransfer by Judge Fulton on March 4, 1965. The negligent oversight of the existing calendared trial date of October 1, 1964 (R. Dkt. entries) was not attributable to the defendant. A 98-day delay from January 7 to April 15, 1966 should not have occurred. The file was in Florida all the while when it was finally transmitted to Arizona. The delay of 260 days from April 15 to December 13, 1966 in Arizona should have been avoided. Concluding that interim the file was sent back to Florida. The further delay in Florida of 412 days before commencement of the trial was unnecessary and cannot be condoned for any reason.

Notwithstanding the venue-appeal procedures terminating on January 7, 1966, the delay incurred to January 1968, more than two years, cannot be justified. No requests for postponement of the trial were made by anyone. If the *Marshall* case is correct, then petitioner is entitled to no less than discharge. It may not be seriously denied that the long lapses in the present case were consistent with dismissal of the indictment for want of a speedy trial. Petitioner was clearly entitled to a speedy trial and it is equally clear he did not receive one.

What is the time standard to be applied in preserving Sixth Amendment rights? If we focus on Criminal Rule 50 ("preference shall be given to criminal proceedings [on calendars] as far as practicable") as the standard, laxity in calendaring criminal cases where there was ample time with no disruption to other court business should be a basis for dismissal on Sixth Amendment grounds. This Court, as far as our study shows, has never considered the impact of Rule 50 as a basis for determining the accused's right to dismissal for want of a speedy trial. This case is ripe for decision on the issue.

The approach suggested in *Hodges v. United States*, 408

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F.2d 543 (C.A. 8, 1969), is that, "The United States Attorney has a duty to press criminal cases to trial, to give them any necessary priority and to prevent whenever possible, even the suggestion of staleness." The prosecution made no inquiries here. In fact, it obstructed the defense by returning the indictment in Arizona 2,200 miles from petitioner's home (Florida) where venue attached equally with Arizona. The delays caused by petitioner's fight to retain venue in Florida to avoid oppression should be attributed to the court and the prosecution. The petitioner's approach in this case was akin to that in *United States v. Provoo*, 17 F.R.D. 183, 201, approved by this Court at 350 U.S. 857, where the Court found the delay was "caused by the deliberate act of the government which the accused attempted to correct."

Neither the prosecution nor the trial court made any effort to bring the case to trial until it was stale. A staleness suggestion, which has any justification for its utterance, (which is evident here) reflects on the court itself and on the administration of federal justice. In *Hodges v. United States, supra*, 408 F.2d at p. 552, the standard applied to Rule 50 which this Court should encourage is that—

> "If a judge is long committed in another case or is delayed in getting to the criminal cases on his calendar by reason of illness, personal misfortune, or press of other business, this obviously does not serve to toll the enforcement of the right of a defendant awaiting trial on that judge's criminal calendar."

Some early delays in the instant case were the result of an Arizona judge's illness.

Underlying the Circuit Court's decision below is the premise that it is the *accused* who has the obligation of securing a speedy trial and that it would be unfair to permit a defendant to sit back and do nothing until the prosecutor notices the case for trial and then claim that he should be discharged because of undue delay. The Fifth Circuit generally has held that the accused must go on record in the

attitude of demanding a trial or resist delay; otherwise, he is deemed to have waived the privilege. *Harlow v. United States*, 301 F.2d 361 (C.A. 5, 1962). Under this rationale, the burden of obtaining a prompt trial is on the defendant. The government, having procured the indictment, is thus not compelled to do anything until the defendant demands a trial and, even then, if not made promptly, is deemed to have waived his right to a speedy trial.

Fairness and simple justice require that when the government sees fit to charge an accused by indictment with the commission of a crime, it is equally the duty of the prosecutor to see that the accused is arraigned, enters a plea, and is speedily brought to trial, as it is to charge him with the offense. From this it follows that the failure of the accused to take affirmative action to prevent delay may not be treated as a waiver.

If Congress had intended for the silence of the accused to be a waiver of his right, it could and doubtless would have used appropriate language in the Rules to convey that intention. Instead, the contrary was demonstrated under Rule 50. If the language in Rule 50 is to be given its usual and ordinary construction, it is impossible to hold that its provisions convey the same meaning as the "accused must demand a trial."

This Court has never squarely announced that silence by an accused is or is not a waiver of his right to a speedy trial. Lower courts have wrestled with the requirements in *Emspeck v. United States*, 349 U.S. 190, 198, that they must "indulge every reasonable presumption against waiver of fundamental rights. . .," and that speedy trial questions turn on whether the delay was "purposeful or oppressive." *Pollard v. United States*, 352 U.S. 354, 361. The meaning must be made sharper lest accused persons continue to wallow in their anxieties while under indictment for protracted periods.

Applying the standards of *Marshall, supra*, the petitioner was denied a speedy trial. The holding in *Marshall* is appli-

cable to the petitioner: "Though the delay was not purposeful in any meaningful sense, much of it was arbitrary, and in the aggregate was oppressive and vexatious." *Marshall, supra,* 337 F.2d at p. 119.

The conclusion that the condonation by the Circuit Court of this succession of procedural shortcomings represents a restriction of petitioner's rights is inescapable. This Court has often said that such departures from accepted standards should not be permitted—that to do so encourages looseness in many ways. Oppression usually has innocent origins. It grows out of small sacrifices of principle and out of seemingly slight relaxations of ancient rules. Unless curbed, these elements gather sudden momentum and irresistible force sweeping aside all barriers contrived to contain them. Law enforcement is certainly essential to a government of laws, but it would be folly to forget that the function of law is to assure liberty and due process.

The present case is preeminently one where the public interest in the even-handed administration of justice calls for an exercise of this Court's supervisory jurisdiction. For if the ruling below stands, then the Sixth Amendment, giving primacy to a right of speedy trial, becomes an empty, though lofty, recitation.

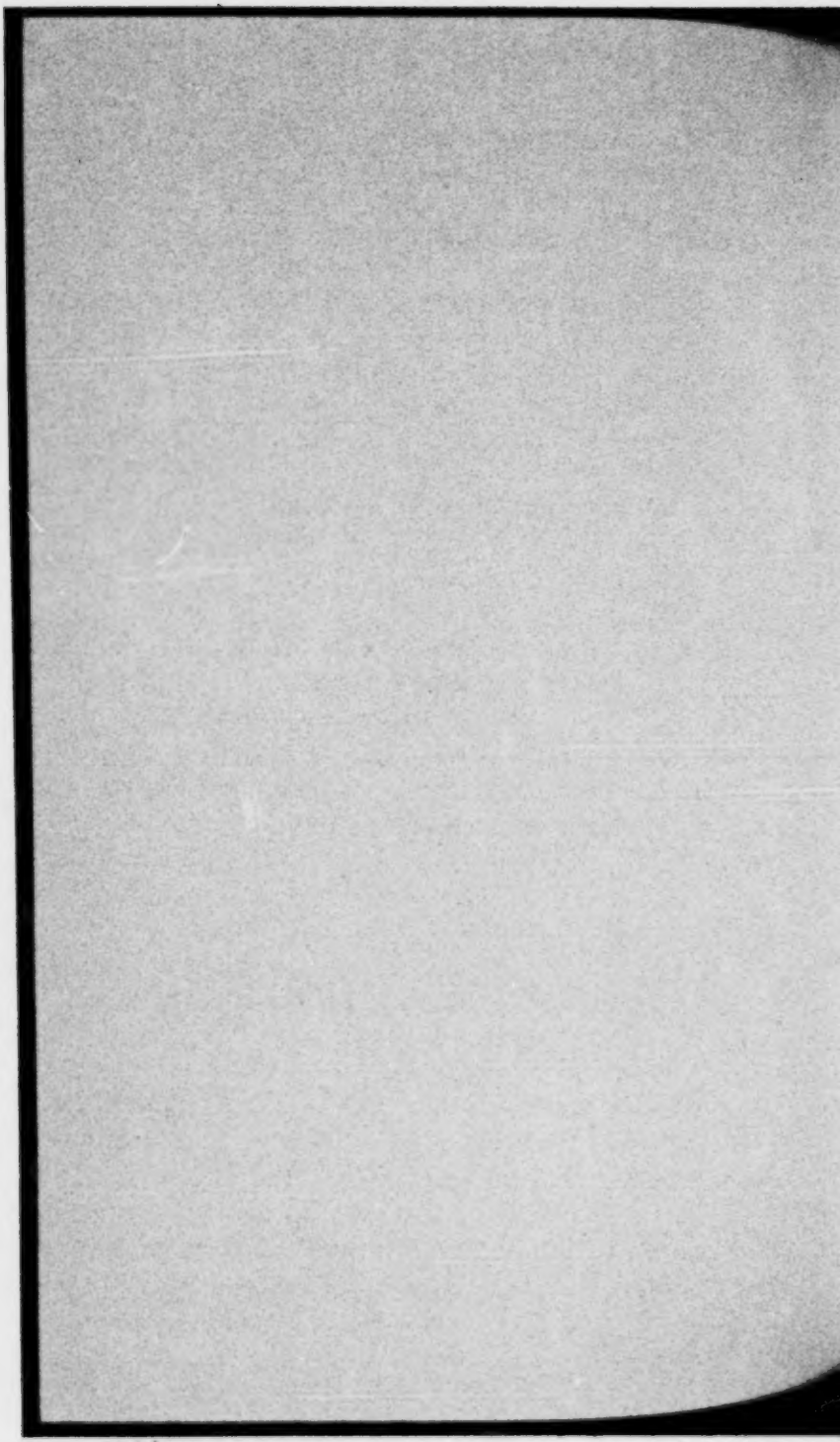
CONCLUSION

For the reasons asserted, it is respectfully submitted that the foregoing petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph J. Lyman
1200–18th Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

April 27, 1970



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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DORY AUERBACH, IRVING GOTTLIEB, and
DAVID PROSSER RANDELL,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(December 9, 1969)

Before WISDOM, GEWIN, and AINSWORTH, Circuit Judges.

PER CURIAM: This appeal presents the following questions: (1) Is the indictment charging defendants-appellants with violating the Federal Mail Fraud Statute, § 1341 of Title 18, U.S.C. so vague and indefinite as to deprive the defendants of their rights under the Fifth and Sixth Amendment, and Rule 7(c) of the Federal Rules of Criminal Procedure? (2) Were the defend-

ants denied their Sixth Amendment right to a speedy trial? (3) Was the evidence sufficient to sustain the conviction of the defendant Gottlieb? We hold that the Constitutional rights of the defendants were not violated and that the record affirmatively reflects evidence beyond a reasonable doubt to sustain the conviction of Gottlieb. The judgment of the district court is affirmed.

The defendants were charged in a twenty-two count indictment for violation of the Federal Mail Fraud Statute, § 1341 of Title 18, U.S.C. involving certain real estate transactions. The indictment was returned by an Arizona Grand Jury March 14, 1963, approximately four years and eleven months before trial of the defendants. Before trial the defendants sought to dismiss the indictment on the grounds that: (1) the indictment failed to contain the elements of the crime so as to apprise them of what they must be prepared to encounter and (2) the defendants were deprived of their Sixth Amendment right to a speedy trial. The motion was denied. The case was tried without a jury and the defendants were found guilty on all counts. The district court denied their motions to dismiss at the conclusion of the Government's case and for judgment of acquittal at the close of all the evidence.

I.

The United States Constitution supports the historical view that "the formality, certainty, and verbal precision required in an indictment has always been one of the most salient characteristics of English criminal

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procedure". 3 Holdsworth, History of English Law 616 (3d ed. 1926). *See also Ex parte Wilson,* 1885, 114 U.S. 417, 5 S.Ct. 935, 29 L.Ed. 89. The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...." The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation...." These constitutional provisions and Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C. must be read as intending that the indictment shall cover all essential elements in the offense. *See United States v. Debrow,* 1953, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92.

The defendants correctly assert that their indictment must cover the elements of a violation of § 1341. In *Adjmi v. United States,* 5 Cir. 1965, 346 F.2d 654, 657, *cert. denied,* 382 U.S., 823, 86 S.Ct. 54, 15 L.Ed.2d 69, this Court stated that these elements are (1) a scheme to defraud and (2) use of the mails to effect this scheme.

The indictment in this case clearly alleges both of these elements. The indictment conforms in all respects to the offense under the statute. Short of pleading evidence, which is not required, we do not see how an indictment could possibly be more specific than the one involved here. In oral argument, counsel for the defendants conceded that this indictment was more specific than any he had observed. The indictment adequately protected these defendants against any sur-

prise from the proof presented by the Government. *See Estes v. United States,* 5 Cir. 1964, 335 F.2d 609, 619, *cert. denied,* 1965, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559. *See also United States v. Grayson,* 5 Cir. 1969, F.2d [No. , slip opinion dated September 17, 1969] and *James v. United States,* 5 Cir. 1969, F.2d [No. , slip opinion dated September 18, 1969].

Contrary to the defendants' contention, the Government's Bill of Particulars did not supplement or change or affect the indictment. *See Pipkin v. United States,* 5 Cir. 1957, 243 F.2d 491.

II.

The defendants contend that the delay between the return of the indictment and the commencement of the trial constitutes a denial of their Sixth Amendment right to a speedy trial.

In the present case the indictment was returned in Arizona. The defendants successfully moved the Arizona District Court, under Rule 21(b) of the Federal Rules of Criminal Procedure, 18 U.S.C., for a change of venue to the Southern District of Florida. Subsequently, the Florida District Court retransferred the case to Arizona. The defendants attempted, unsuccessfully, to stay the retransfer by appeals to this Court and to the United States Supreme Court and by a mandamus action to this Court. They succeeded however, in moving the Arizona District Court to return the case to the Southern District of Florida.

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The Government properly decided to bring the indictment in Arizona. The business activities of the appellants occurred in Kingman, Arizona. The mailing and receiving of correspondence all occurred in Kingman.

The factors to consider in determining whether a defendant has been deprived of his Sixth Amendment right to a speedy trial are: (1) the length of the delay (2) the reasons for the delay (3) the prejudice suffered by the defendant and (4) whether the defendant has waived his right. The record affirmatively discloses that the delays in this case were not caused by any arbitrary, capricious, vexatious, oppressive, deliberate, or negligent conduct on the part of the Government. Similarly, the appellants have suffered no serious prejudice as a result of the delays which did not ensue from the ordinary and inevitable delays.

The defendants' assertion that the failure to demand the right to a speedy trial should not constitute a waiver of that right is not to be lightly dismissed. A waiver of one's constitutional right cannot be inferred from a silent record, and the courts must indulge in every reasonable presumption against a waiver of a fundamental constitutional right. *Johnson v. Zerbst*, 1930, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461. *See Klopfer v. North Carolina*, 1967, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1.

The record, however, affirmatively indicates that the appellants repeatedly sought the aid of both the Florida and Arizona District Courts, this Court, and the United States Supreme Court in asserting both their

constitutional and statutory rights. Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.

III.

In considering Gottlieb's motion for judgment of acquittal, the district judge must consider the evidence in the light most favorable to the Government. *Blachly v. United States,* 5 Cir. 1967, 380 F.2d 665. *McFarland v. United States,* 5 Cir. 1960, 273 F.2d 417. It must also consider all the inferences that may reasonably be drawn from the facts. *Cartweight v. United States,* 10 Cir. 1964, 335 F.2d 919.

The district judge, sitting as the trier of fact, found that the evidence was sufficient to show beyond a reasonable doubt that Gottlieb participated in the scheme to defraud. The Government introduced competent, credible testimony to establish the working relationship of Gottlieb with Auerbach and Randell and Gottlieb's knowledge of the scheme and his participation in it. The Court properly denied Gottlieb's motion for judgment of acquittal.

The judgment is AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

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APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1969

No. 26343

D. C. Docket No. 64-397-CR-CA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DORY AUERBACH, IRVING GOTTLIEB and DAVID PROSSER RANDELL,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 9, 1969

Issued as Mandate:

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DORY AUERBACH, IRVING GOTTLIEB, and
DAVID PROSSER RANDELL,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

(February 26, 1970)

ON PETITIONS FOR REHEARING

Before WISDOM, GEWIN, and AINSWORTH, Circuit Judges.

PER CURIAM: All of the defendants-appellants have petitioned for rehearing. One of the appellants, David P. Randell, has reiterated his original contention that the trial court's order dismissing portions of the

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indictment constituted an amendment of the indictment thereby ousting the trial court of jurisdiction to proceed to trial. In our per curiam opinion of December 9, 1969, we did not discuss this contention, because of the liberalizing effect Rule 7(c) and (d) has had on the principles enunciated in *Ex parte* Bain, 1886, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849. We have, however, carefully reviewed the authorities on this point and conclude that the trial court did not commit reversible error. See *Overstreet v. United States,* 5 Cir. 1963, 321 F.2d 459 and *Thomas v. United States,* 5 Cir. 1967, 398 F.2d 531, analyzing in detail the Supreme Court's ruling in *Bain. See also Salinger v. United States,* 1926, 272 U.S. 542, 47 S.Ct. 531, 71 L.Ed. 398; 1 C. Wright, Federal Practice and Procedure, §127 at 275-276 (1969) and 8 J. Moore, Federal Practice, ¶7.05[1]-[3], (1969 Cum. Supp.).

It is ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

64-397-CR-CF

INDICTMENT
No. C-4619 Pct.

Violation: 18 U.S.C. 1341 (Mail Fraud)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB,
Defendants.

THE GRAND JURY CHARGES:

COUNT 1

1. That during all or part of the times hereinafter mentioned LAKE MEAD RANCHEROS, INC., was a corporation organized under the laws of the State of Delaware and licensed to transact business in the State of Arizona, with principal offices at 2320 Madison Street, Hollywood, Florida, and 799 N.W. 62nd Street, Miami, Florida, and using mailing addresses in Kingman, Arizona of 1118 West Beale St., 1039 Fairgrounds Blvd., and 1033 West Beale St., and the defendants, DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB, were officers, directors and stockholders in said corporation and actively engaged in the business thereof.

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2. That commencing prior to July 13, 1961, and continuing to the present time, the defendants, DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB, hereinafter referred to as "defendants", devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from persons residing throughout the United States, including but not limited to:

Charles E. Arrington, 20 Vine St., West Lynn, Mass.

Joseph A. Aguello, 8830 - 182nd St., Hollis 23, New York

David L. Brill, 628 Grove Ave., Metuchen, New Jersey

Frank Catalano, 232 Courthouse Road, Franklin Square, L.I., New York

Tullio J. DiLorenzo, 24 Albemarle Place, Yonkers, 2, New York

Richard J. Eddy, 300 Montgomery St., Bloomfield, New Jersey

Otto L. Erbach, 33-15 - 81st Street, Jackson Heights 72, New York

William A. Farrell, 2503 East 19th St., Brooklyn 35, New York

Donald E. Fitch, 3800 Brookcrest Place, Annandale, Virginia

Cameron W. Frazier, Box 498, U.S. Soldiers Home, Washington 25, D.C.

Dominic Giordano, 23 Netto Lane, Plainview, L.I., New York

Melvin S. Gould, 50 Eldorado Blvd., Plainview, L.I., New York.

Francis E. Grenier, 29736 Hillbrook, Livonia, Michigan

Mrs. Ida Groves, 1170 Sledge Ave., Memphis, Tennessee

Martin Hanley, 180 Greenpoint Ave., Brooklyn 22, New York

Joseph Just, 6327 S. Kedvale Ave., Chicago 29, Illinois

Harry Korpela, 2225 Benson Ave., Brooklyn, New York

Robert A. LaBrie, 122 Bradford St., Lawrence, Mass.

Clarence R. Lambert, 393 Buck Road, Holland, Penna.

William W. Mowrey, 34 Rexhame St., Roslindale 31, Mass.

Robert F. Parker, 8510 Superior, Centerline, Mich.

Mrs. Helen A. Perry, 35 Albion St., Bridgeport 5, Conn.

Harry Pray, 289 North Monroe Ave., Lindenhurst, L.I., New York

Miss Carolyn V. Sharpe, 38 St. Andrews Place, Yonkers, New York

Frank Scott, 2565 E. Midland Road, Indianapolis 27, Ind.

Dwayne Shirley, 324 Bacon St., Deerfield, Mich.

Donald J. Thomas, 10306 Oakland, Kansas City 34, Missouri

Don G. Walters, 114 Locust Road, Morton, Penna.

Mrs. Marian C. Zerbe, 4810 Junius, Dallas 10, Texas

Mrs. Marian K. Zisman, 6102 Horner St., Los Angeles, 85, Calif.

Miss Carol M. Zisman, 6102 Horner St., Los Angeles, 35, Calif.

and others to the Grand Jury unknown, said persons representing that closs of person who could be, and were, induced to purchase lots in Lake Mead Rancheros subdivisions located in Mohave County, Arizona, which said scheme and artifice is described more particularly hereinafter.

3. It was a part of said scheme and artifice to defraud that the defendants would and did cause Lake Mead Rancheros, Inc., to purchase or contract to purchase all or portions of seventeen (17) sections of range land, being odd-numbered sections 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35, in Township 25 North, Range 15 West, Gila and Salt River Base and Meridian, situated in Mohave County, Arizona, which said sections, or partial sections of land, were subdivided as Lake Mead Rancheros subdivision units 1 through 17, consisting of approximately 5,513 lots.

4. It was a further part of said scheme and artifice to defraud that the defendants would and did cause Lake Mead Rancheros, Inc., to offer the said lots in said Lake Mead Rancheros subdivision units for sale to the public on the deferred payment plan, with a down payment and monthly installment payments until payment in full of the purchase price, by means of advertising which they caused to be published in newspapers throughout the United States and in advertising material mailed by Lake Mead Rancheros, Inc., directly to prospective purchasers.

5. It was a further part of said scheme and artifice to defraud that the defendants would and did cause the mailing addresses of 1118 West Beale Street, 1309 Fairgrounds Blvd., and 1033 West Beale Street in Kingman,

of Lake Mead Rancheros, Inc., for the purpose of creating in the minds of customers and prospective customers of Lake Mead Rancheros, Inc., the false belief that they were dealing with a company headquartered in Arizona or with operating offices near the property offered for sale; whereas in truth and in fact mail addressed to Lake Mead Rancheros, Inc., at these Kingman, Arizona, addresses was not processed at Kingman at all, but forwarded to Lake Mead Rancheros, Inc., at Hollywood, Florida, or Miami, Florida.

6. It was a further part of said scheme and artifice to defraud that the defendants would and did, for the purpose of inducing persons to purchase lots in the said Lake Mead Rancheros subdivisions make, and cause to be made, in advertising literature published in newspapers and in other literature mailed to prospective purchasers the following deceptive, false and fraudulent representations, well knowing at the time that the representations would be, and were deceptive, false and fraudulent when made:

a. That the Lake Mead Rancheros subdivisions were located "on a through route to Lake Mead"; that "the through route from Highway 66 to Lake Mead winds gracefully through the Rancheros"; that "the Rancheros are ideally located only 6 miles north of U.S. 66, directly on Hackberry Road, the thoroughfare to the giant Lake Mead Recreational Area"; that "the Rancheros are ideally located only 6 miles north of U.S. 66, directly on Hackberry Road, the thoroughfare to two of the most favored sites in the giant Lake Mead Recreation Area"; that the Rancheros "are directly on Hackberry

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Road, main route to the Lake Mead Recreation Area";

b. That the Lake Mead Rancheros subdivisions were "Laid out, waiting for people", "livable now", "not raw, undeveloped", "fully developed" and "improved".

c. That Lake Mead Rancheros are a "jackpot investment", "among the finest investments anywhere", and "directly located in the path of Arizona progress".

d. That "Lake Mead Rancheros is located just a few miles from Kingman, near Lake Mead and Lake Mohave".

7. It was a further part of said scheme and artifice to defraud that the defendants would and did, about September, 1962, after approximately three thousand persons had purchased lots in the said original seventeen Lake Mead Rancheros subdivision units, commence negotiations for the purchase by Lake Mead Rancheros, Inc., of land at the junction of U.S. Highway 66 and Hackberry Road in Mohave County, approximately six miles distant from the nearest of their then existing seventeen subdivision units, which land was adjacent to U.S. Highway 66 along or near which highway there were existing power and telephone lines and a water pipe line carrying water to the City of Kingman, Arizona, and would and did cause Lake Mead Rancheros, Inc., to enter into an agreement with the Arizona Land Title & Trust Company of Tucson, Arizona, on or about January 2, 1963, for the purchase of such land, that land being all of Section 31 lying north of U.S. Highway 66, in Township 24 North, Range 14 West, Gila & Salt River Base and Meridian, in Mohave

County, Arizona, which said Section 31 is crossed by U.S. Highway 66, said purchase agreement providing for the first release of land thereunder to the vendee upon payment of the sum of $51,000.00, which payment is due under the terms of said agreement on or before December 20, 1963, and would and did, on or about January 15, 1963, cause that portion of the said Section 31 situated north of U.S. Highway 66 to be subdivided as Lake Mead Rancheros subdivision unit No. 20.

8. It was a further part of said scheme and artifice to defraud that the defendants would and did, for the continuing purpose of inducing persons to purchase lots in the said Lake Mead Rancheros subdivision units, make and cause to be made in advertising literature published in newspapers and in other literature mailed by Lake Mead Rancheros, Inc., to lot owners and prospective lot purchasers the following additional deceptive, false and fraudulent representations, commencing about the middle of September, 1962, and continuing to on or about January 2, 1963, well knowing at the time that the representations would be, and were, deceptive, false and fraudulent when made:

a. "Build in a new community coming to life! A new community is about to come to life—and you can have a part of its future! Lake Mead Rancheros has always been one of the best long-range investments you could make . . . but now your investment dollar gets much more! We have acquired COMPLETE UTILITY SERVICES! This means you can own a king-sized western estate . . . with ROADS, and ELECTRICITY, WATER and

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PHONES available. Obviously, the presence of utilities makes the Rancheros even more rewarding as investment property . . . for once the community takes shape and homes go up, you can subdivide your 1¼ acres into smaller homesites, for sale at a profit";

b. "ROADS, WATER, ELECTRICITY, PHONES. Every Ranchero is laid out, waiting for you! Piped water, electricity, and phone service available now in the building area at no extra cost. A community is about to come to life . . . in an area already in great demand!";

c. "We have now acquired the land fronting on U.S. 66, in order to offer the vital services you require for comfortable, convenient, wide-open western living! After months of negotiation and frustrating delay, LMR management was successful in getting the land extending down the Hackberry Road to Route 66. This is the vital acreage so necessary to transform the Rancheros from an investment for your future to an investment in a living community, ready for immediate occupancy. This land was the missing link in establishing an orderly development pattern. Now that we own it . . . watch us grow!";

d. "Power lines are already in on this newly acquired land, so LMR owners will get their power at the published rate of the Mohave Electric Cooperative", "Telephone lines traverse this property, too, so houses and busi-

nesses will be served by the Citizens Utility Company of Kingman as the need for telephones develops";

e. "LAKE MEAD RANCHEROS IS READY FOR IMMEDIATE LIVING! We have just spent three weeks—a culmination of months planning—completing details that will guarantee all living facilities for every Ranchero. This means that for the same price as before, you can now own a king-sized western estate . . . with roads, and electricity, water and phones available . . . all the utilities necessary for a growing community";

f. "Those who wish to build immediately may always exchange their parcel for any other available anywhere in the property. In addition, you may exchange your tract for one in the newly acquired land—at no additional cost—at any time within the next three years, providing you build within this period".

9. It was a further part of said scheme and artifice to defraud that the defendants would and did scheme to mislead and deceive prospective purchasers and purchasers of lots in Lake Mead Rancheros subdivisions by use of a falsely labeled photograph, specifically a photograph appearing in an advertising brochure used by Lake Mead Rancheros, Inc., and mailed to prospective lot purchasers, showing land with a power line existing thereon and the statement below the picture: "NOW YOU SEE IT! The Valley of the Music Mountains . . . location of Lake Mead

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Rancheros. This is the land as it looked on June 16, 1961, prior to any development work."; well knowing at the time said pretenses and representations were made that they were deceptive, false and fraudulent.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did scheme to mislead and deceive prospective purchasers and purchasers of lots in the said Lake Mead Rancheros subdivisions by withholding and failing to disclose in the advertising of Lake Mead Rancheros, Inc., the material fact that the various Lake Mead Rancheros subdivision units consisted of only the odd-numbered sections of land in a checkerboard pattern in an area where all the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes.

11. On or about September 17, 1961, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused to be delivered by mail at Kingman, within the State and District of Arizona, according to the direction thereon, a letter containing a $10.00 check, mailed by Otto L. Erbach, 33-15 - 81st, Jackson Heights 72, New York, and addressed to Lake Mead Rancheros, Kingman, Arizona, in violation of 18 U.S.C. 1341.

COUNT II.

1. The Grand Jury realleges, with the same force and effect as though fully set forth in detail herein, all of the allegations contained in paragraphs 1 through 10 of Count I of this Indictment, and further alleges;

* * *

[each of the next 21 counts incorporated paragraphs 1 through 10 of Count I]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Oct. 2, 1964]

No. 64-397-Cr-CF

UNITED STATES OF AMERICA,
Plaintiff,

v.

DORY AUERBACH, DAVID PROSSER RANDELL and IRVING GOTTLIEB,
Defendants.

BILL OF PARTICULARS

COMES NOW the plaintiff, United States of America, and submits its Bill of Particulars pursuant to the court order of July 27, 1964 in the above entitled cause.

I.

The representations in Paragraph 6(a) of the indictment, when considered in the light of the statement made in the same advertising that three and one-half million people visit Lake Mead recreation areas annually, are false and fraudulent in that they are designed to and did mislead and deceive purchasers of lots in the Lake Mead Rancheros subdivisions to believe that these visitors to the Lake Mead recreational area or at least two of its most favored sights would have to pass by or through the Lake Mead Rancheros subdivision via Hackberry Road if

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they travelled the main route, the thoroughfare and the through route to the Lake Mead recreational area, thereby creating an attractive investment feature, that is, exposure to, and in the path of, heavy tourist traffic, whereas Hackberry Road is a gravelled road which leads off of Highway 66 and crosses Lake Mead Rancheros property and proceeds about 48 miles to Pierce Ferry Boat Landing and Gregg's Ferry Landing, two of the least used, developed or visited access points on Lake Mead; that Hackberry Road is not commonly known or used as a through route, and is not the thoroughfare or main route to the Lake Mead recreation areas or at least two of the most favorite sights in the Lake Mead recreation area; the commonly known and used through route, thoroughfare or main route to Lake Mead and its favored recreational sights being Highways 66 and 93.

II.

The representations in Paragraph 6(b) of the indictment are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead subdivision units to believe that Lake Mead Rancheros property had available the necessary utilities to accommodate residential or commercial buildings on individual lot sites such as power lines, telephone lines and a potable water supply, whereas there were no power lines, telephone lines or potable water supply on any of the original seventeen subdivisions to which this advertising was directed and, therefore, were not "fully developed" or "liveable now".

III.

The representations in Paragraph 6(c) of the indictment are false and fraudulent in part, for reasons set out in Paragraphs I and II above and further, in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that purchase of lots in the subdivision units of the Lake Mead Rancheros was a favorable investment and was in the path of Arizona progress, whereas said property is not in the path of progress and is not a suitable investment for those contemplating a commercial and residential lot site purchase by the very nature of the pattern in which these subdivisions lay, to-wit, the seventeen Lake Mead Rancheros subdivision units comprise all the odd-numbered sections of land in a township in which all the even-numbered sections are owned by the government and subject to use for cattle grazing purposes, this checker board pattern, so to speak, being a material fact adversely affecting the probability or possibility of an orderly residential community ever developing on the subdivisions and further, that the aforesaid subdivisions had no power lines, telephone lines or potable water supply and under the circumstances, no reasonable prospects of said facilities and utilities servicing this land subdivided for residential lot sites, thereby making said land not an investment as represented.

IV.

The representations in Paragraph 6(d) of the indictment are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that said land

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had a close proximity to the stated points so as to favorably affect the investment potential of Lake Mead Rancheros property, whereas the defendants failed to disclose the material fact that their land is 26 miles from Kingman, Arizona, approximately 57 miles from the nearest access point on Lake Mohave and approximately 48 miles from the nearest access point on Lake Mead via existing road, said distances providing no favorable effect on the investment potential of said property.

V.

The representations in Paragraphs 8(a-f) are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that (a) Lake Mead Rancheros had acquired new land that provided complete utility services, such as telephone lines, power lines and potable water supply to accommodate residential and commercial buildings on Lake Mead Rancheros subdivision lot sites, whereas in truth and in fact Lake Mead Rancheros had not acquired any such land nor any such utilities.

VI.

The pretenses and representations in Paragraph 9 of the indictment are false and fraudulent in that they are designed to mislead and deceive prospective purchasers of lots in Lake Mead Rancheros subdivision units to believe that the power line pictured in the said photograph was located on land on Lake Mead Rancheros subdivisions or on land owned by Lake Mead Rancheros, Inc., whereas

the land appearing in the said photograph was not a part of the said Lake Mead Rancheros subdivisions or land owned by Lake Mead Rancheros, Inc. at the time, nor did any power lines exist on Lake Mead Rancheros property at the time.

WILLIAM A. MEADOWS, JR.
UNITED STATES ATTORNEY

By
Edward A. Kaufman
Assistant U.S. Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1478

DAVID PROSSER RANDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 1a–6a) is reported at 420 F. 2d 921.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1969 (Pet. 7a). Petitions for rehearing were denied on February 26, 1970 (Pet. 8a–9a). Mr. Justice Black granted an extension of time to file a petition for a writ of certiorari until April 27, 1970. Petitioner Randell filed his petition on April 25, 1970.[1]

[1] Co-defendants Auerbach and Gottlieb filed a petition to review their convictions (No. 1353, O.T., 1969) on March 26, 1970. The Government's opposition brief in No. 1353 has already been filed.

186-020—70

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment was rendered invalid by reason of the fact the court, prior to trial, ordered parts of the indictment stricken in accordance with a defense motion.

2. Whether petitioners were denied their Sixth Amendment right to a speedy trial.

STATEMENT

A 22-count indictment filed on March 14, 1963, in the United States District Court for the District of Arizona charged petitioner and co-defendants Auerbach and Gottlieb with mail fraud in violation of 18 U.S.C. 1341 (Pet. 10a–19a) in connection with offers to the public to sell certain real estate located in Mohave County, Arizona (R. 2572, 2585–2601). The indictment alleged that petitioner and defendants Auerbach and Gottlieb were officers, directors and stockholders of Lake Mead Rancheros, Inc.—a Delaware corporation licensed to transact business and having mailing addresses in Kingman, Arizona but with principal offices in Florida—and were actively engaged in the business of that corporation (Pet. 10a).

The substance of the scheme to defraud as alleged in the indictment is set forth on pp. 2–3 of the government's brief in opposition in No. 1353, the companion case. The general nature of the scheme was that, by reason of false and fraudulent representations, lots would be sold to the public advertised as fine invest-

ments located just a few miles from Kingman on a through route to Lake Mead, equipped with complete utility services for electricity, water and phones, and ready for immediate living. Paragraph 7 of count 1 of the indictment (Pet. 15a–16a) alleged as part of the scheme that, after approximately 3,000 persons had purchased lots in the original 17 subdivision units, the corporation entered into an agreement to purchase a strip of land, upon which there were existing power, telephone, and water lines, located about six miles from the nearest of the subdivision units.

Prior to trial, on the motion of defendants to dismiss certain paragraphs of count 1 of the indictment, the district court on December 11, 1967, after considering briefs and oral argument, ordered all of paragraphs 7 and 6(c), as well as the first two sentences of paragraph 8(a),[2] stricken (R. 2851). The district court doubted the relevancy of paragraph 7 to the overall scheme (R. 2909, 2913, 2935) and ruled that the allegations in 6(c) and 8(a) should be stricken as a "futuristic sort of puffing" (R. 2905, 2935).

The case was tried without a jury. Petitioner and the co-defendants were found guilty on all counts. On June 14, 1968, the court sentenced petitioner to prison terms of nine months on each of counts 1 through 22

[2] Paragraph 6(c) referred to representations "That Lake Mead Rancheros are a 'jackpot investment', 'among the finest investments anywhere', and 'directly located in the path of Arizona progress'." (Pet. 15a). The first two sentences of paragraph 8(a) referred to representations to "Build in a new community coming to life! A new community is about to come to life—and you can have a part of its future!" (Pet. 16a).

inclusive, suspended sentence, placed him on probation for three years, and ordered him to pay a $5,000 fine (R. 3046). On appeal, the convictions were affirmed (Pet. 1a–7a).

ARGUMENT

1. Petitioner contends the court's pretrial order, striking paragraphs 7, 6(c) and part of 8(a) of count 1, was an improper judicial amendment of the indictment without resubmission to the grand jury, thereby voiding the subsequent conviction (Pet. 12–16). His argument is premised upon the mistaken assertion that these paragraphs were stricken by the district court *sua sponte* (Pet. 5, 12), when in fact the district court's determination was in response to a pretrial motion filed by petitioner and co-defendants on November 24, 1967, seeking dismissal of the very parts of the indictment which were eliminated (R. 2851). Having come into the district court on pretrial motion and successfully argued for the elimination of the striken paragraphs, petitioner cannot now be permitted to set aside his conviction on the basis of the earlier ruling in his favor. See Rule 7(d), F.R. Crim. P.[3]

Moreover, in striking paragraphs 7, 6(c) and part of 8(a) of count 1, the district court did not change the indictment in any substantial manner. Since the fundamental nature of the overall scheme charged remained the same, the court's action clearly cannot be construed as an unauthorized amendment to the indictment. See *Salinger* v. *United States,* 272 U.S. 542,

[3] Rule 7(d): "The court on motion of the defendant may strike surplusage from the indictment or information."

548–549. As stated by the court below on denial of petitions for rehearing (Pet. 8a–9a), "the liberalizing effect Rule 7 (c) and (d) has had on the principles enunciated in *Ex parte Bain,*" 121 U.S. 1, prompted the conclusion "that the trial court did not commit reversible error" in this regard.

2. Petitioner's contentions relating to the alleged denial of the right to a speedy trial are answered in the government's brief in opposition in No. 1353, pp. 7–10.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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